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No. 82-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, *et al.*,
*Petitioners,*

vs.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA,
*Respondent.*

KAISER CEMENT AND GYPSUM CORPORATION, *et al.*,
*Real Parties in Interest*

## PETITION FOR A PREJUDGMENT WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEF D. COOPER
*Counsel of Record*
TRACY R. KIRKHAM
KIRK A. MCKINNEY
ELIZABETH A. SPURLOCK
COOPER, KIRKHAM, HAINLINE
& MCKINNEY, P.C.
300 Montgomery Street,
Suite 600
San Francisco, CA 94104
(415) 788-3030

KENNETH R. REED
MARK D. FREITAG
*Special Assistant*
*Attorneys General for the*
*State of Arizona*
REED, GOLDSTEIN AND
JENKINS-REED, P.C.
114 West Adams,
Suite 760
Phoenix, AZ 85003
(602) 254-1973

*Counsel for Petitioners*

*(Additional Counsel Are Listed Following the Signature Page)*

## QUESTION PRESENTED

Is an absent member of a class certified under Rule 23, Federal Rules of Civil Procedure, a "party" within the meaning of 28 U.S.C. § 455(b)(4) such that district and circuit judges, members of the Judicial Panel on Multidistrict Litigation, and Justices of the Supreme Court must recuse themselves if they or their spouses own stock of any absent class member?

## PARTIES TO THE PROCEEDING

Petitioners are named plaintiffs in *In re Cement and Concrete Antitrust Litigation,* MDL Docket No. 296, a multidistrict class action currently pending in respondent United States District Court for the District of Arizona, and are listed in note 1, *infra.* Real parties in interest are defendants below and are listed in note 2, *infra.*

Petitioners recognize that compliance with Supreme Court Rules 21 and 28 in class actions is ordinarily accomplished by listing only the named representative parties. *E.g., Weyerhaeuser Co.* v. *Lyman Lamb Co.,* No. 81-1618 and *Georgia-Pacific Corp.* v. *Lyman Lamb Co.,* No. 81-1619, ____ U.S. ____, 102 S.Ct. 2232 (1982), *granting cert. sub nom. In re Plywood Antitrust Litigation,* 655 F.2d 627 (5th Cir. 1981). The district court Order in this case, however, held that all 210,235 putative class members are "parties" for purposes of recusal under 28 U.S.C. § 455(b)(4), thus compelling petitioners to identify all class members as "parties." *In re Cement and Concrete Antitrust Litigation,* 515 F. Supp. 1076, 1079-80 (D. Ariz. 1981).

In order to avoid listing 210,235 "parties" in this printed petition, petitioners are filing concurrently herewith a "Motion for Relief from Compliance with Certain Provisions of Supreme Court Rules 19.3, 21.1(b), 28.1 and 28.3" so that petitioners might obtain leave to serve this Petition on only the named parties below and that the single copy of the list lodged with the Clerk of the Court with the Petition for a Writ of Certiorari in No. 82-287 (filed August 16, 1982) now pending satisfies all other filing and service requirements.

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KAISER CEMENT AND GYPSUM CORPORATION, *et al.*,
*Real Parties in Interest*

## PETITION FOR A PREJUDGMENT WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a Prejudgment Writ of Certiorari issue to review the decision of respondent United States District Court for the District of Arizona, which decision is currently before the United States Court of Appeals for the Ninth Circuit pursuant to a Petition for a Writ of Mandamus. (Jurisdiction was accepted by the Court of Appeals on October 31, 1981.)

## OPINIONS BELOW

The Opinion filed May 26, 1981, by Chief District Judge C. A. Muecke is reported at 515 F.Supp. 1076 (D. Ariz. 1981), and is reprinted as Appendix B to the Petition for Writ of Certiorari in No. 82-287. The October 30, 1981 Order of the United States Court of Appeals for the Ninth Circuit accepting jurisdiction pursuant to a Petition For a Writ of Mandamus and directing the clerk to calendar oral argument is reprinted at Appendix D to the Petition in No. 82-297. This Order was amended regarding other jurisdictional grounds on January 27 and April 15, 1982 and is reported at 673 F.2d 1020 (9th Cir. 1982). No further orders or opinions have been issued by the Court of Appeals since the filing of the Petition in No. 82-287; therefore petitioners incorporate by reference the Appendices to that petition.

## JURISDICTION OF THIS COURT

The Order of respondent United States District Court was entered on May 26, 1981 and a Petition for Mandamus was accepted by the United States Court of Appeals for the Ninth Circuit for determination on the merits on October 31, 1981. Oral argument was held January 4, 1982 and no decision has been issued by the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

## STATUTORY PROVISION INVOLVED

The statute involved is 28 U.S.C. § 455, reprinted as Appendix I to the Petition in No. 82-287.

## STATEMENT OF THE CASE

Beginning in September 1976, petitioners[1] brought a total of 32 separate actions in 12 different district courts, individually and as class representatives, seeking monetary and injunctive relief from real parties in interest and other defendants[2] for an alleged conspiracy to fix, stabilize and maintain the price of cement and cement-containing products throughout the United

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[1] Petitioners and the plaintiffs below are: the States of Alabama, Arizona, California, Colorado, Florida, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, New Mexico, Oregon, Texas and Utah; Rubenstein Development Company and Harry Rubenstein; Bill Carson d/b/a Bill Carson Construction and Bill Carson Construction Co., Inc.; Leavell Company; James I. Barnes Construction Co. and James I. Barnes Construction Co., Inc.; William P. Jungelaus; Buck Brown Contracting Company, Inc.; Hechinger Company; Katterjohn Concrete Products of Owensboro, Kentucky, Inc.; The Sta-Dri Company; York Concrete Co. and York Concrete, Inc.; Sea Foamed of San Diego and Sea Foamed of Arizona; Vincent S. Perry and Ellis F. Hendricks, individually and d/b/a Perry and Hendricks; Estes Homes; Blankenship Builders, Inc. and Blankenship Construction Co.; Wooldridge Construction Co.; John Talley and John Talley Construction, Inc.; Picou's Builders Supply, Inc.; City of Austin, Texas; Northern Materials, Inc.; Smith & Green Corp., Allen R. Smith and Raymond Green; Colorado Concrete Mfg. Co.; Walter K. Laursen d/b/a Thriftway Lumber and Thriftway Lumber Company; and Edward W. Bergquist, as Trustee in Bankruptcy for Western Concrete Products Corp.

[2] Real parties in interest and/or defendants below are: Alamo Cement Corp.; Alpha Portland Industries, Inc.; Arkansas Cement Corp.; Ash Grove Cement Co.; Capitol Aggregates, Inc.; Centex Corp.; Centex Cement Corp.; Citadel Cement Corp.; Columbia Cement Corp.; Coplay Cement Mfg. Co.; Cyprus Hawaiian Cement Corp.; Dundee Cement Co.; Filtrol Corp.; General Portland, Inc.; Giant Portland Cement Co.; Ideal Basic Industries, Inc.; Kaiser Cement Corp.; Keystone Portland Cement Co.; Lehigh Portland Cement Co.; Lone Star Industries, Inc.; Louisville Cement Co.; Marquette Co.; Martin-Marietta Corp.; Medusa Corp.; Missouri Portland Cement Co.; Monarch Cement Co.; Monolith Portland Cement Co.; National Cement Co., Inc.; National Gypsum Co.; Nevada Cement Co.; OKC Corporation; Oregon Portland Cement Co.; Portland Cement Association; Portland Cement Co. of Utah; Santee Portland Cement Corp.; The Flintkote Co.; United States Steel Corp.; Valley Cement Industries, Inc.; Whitehall Cement Mfg. Co.; and Wyandotte Cement Inc. Pursuant to Supreme Court Rule 28.1, a listing of all parent companies, subsidiaries, and affiliates of the various respondents known to petitioners is set forth in Appendix J to the Petition in No. 82-287.

States in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. The jurisdiction of the district courts was based upon 28 U.S.C §§ 1331 and 1337 and sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. On September 12, 1977, the Judicial Panel on Multidistrict Litigation transferred these actions to respondent United States District Court for the District of Arizona and assigned them to Chief Judge C. A. Muecke for coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407. *In re Cement and Concrete Antitrust Litigation,* 437 F. Supp. 750 (J.P.M.D.L. 1977). *See also In re Cement and Concrete Antitrust Litigation,* 465 F. Supp. 1299 (J.P.M.D.L. 1979).

Following extensive discovery and voluminous briefing, Judge Muecke certified that these actions should proceed as class actions pursuant to Rule 23, Federal Rules of Civil Procedure. *In re Cement and Concrete Antitrust Litigation,* 1979-1 CCH Trade Cases ¶62,502 (D. Ariz. 1979). The parties then undertook further discovery to compile from defendants' customer lists the names and addresses of 210,235 putative class members. *In re Cement and Concrete Antitrust Litigation,* 673 F.2d, at 1022. Using this list for mailed notice and also using supplementary notice by publication, the putative class members were advised pursuant to Rule 23(c)(2), Federal Rules of Civil Procedure, of the pendency of this litigation and of their right to be excluded from the class.[3] The deadline for putative class members to seek exclusion from the class expired on December 31, 1980, and, more than four years after the litigation was first commenced, the membership of the class was finally fixed.

On February 23, 1981, real parties in interest filed a motion asking Chief Judge Muecke to recuse himself under 28 U.S.C. § 455(b)(4). CA9 App. Ex. 14. The motion was based on the fact that Chief Judge Muecke's wife had inherited as her sole and separate property stock in seven absent class members. 515 F. Supp., at 1080, 1082-83. The motion argued that Judge Muecke was required to recuse himself no matter how insignificant his wife's stock holdings because (1) absent class

[3] Exhibit 6 in Appendix to Petition for Permission to Appeal From the United States District Court for the District of Arizona Pursuant to Title 28 U.S.C. § 1292(b) and Brief of Petitioner (hereinafter "CA9 App. Ex. ").

members are "parties" to the litigation within the meaning of 28 U.S.C. § 455(b)(4), and (2) his wife's stock ownership was "a financial interest in the subject matter in controversy" under section 455(b)(4).

Based solely on his conclusion that absent class members are parties,[4] Chief Judge Muecke granted the motion of real parties in interest and recused himself on May 26, 1981. Chief Judge Muecke noted that any conceivable financial benefit to his wife was so insignificant that it could not "seriously be contended that [his] continuation in this matter creates the appearance of impropriety," 515 F. Supp., at 1081, and lamented over the wastefulness and inefficiency of transferring the litigation to a new judge.[5] Nonetheless, he interpreted section 455(b)(4) as imposing a mandatory requirement of recusal based upon his wife's stock ownership in absent class members:

> I have concluded that I must recuse myself, not because I feel a sense of conflict, and not because I feel that to continue would create the appearance of impropriety. I have concluded that I must recuse myself for the sole reason that the law, as written, says I must.

515 F. Supp., at 1078. On June 3, 1981, Chief Judge Muecke amended his May 26, 1981 Opinion, found that his recusal "involve[d] a controlling question of law as to which there is

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[4] Regarding real parties' in interest alternative basis for recusal, Chief Judge Muecke found "the term 'subject matter in controversy' to be inherently vague," but noted that his "conclusion that the 'parties' provision of § 455 is applicable to the present case makes the resolution of the 'subject matter in controversy' issue unnecessary." 515 F. Supp., at 1080.

[5] Chief Judge Muecke commented:

> Compare my wife's financial interest in this litigation with the burden of applying § 455. As I have said, this case is into its sixth year. This Court has entered 75 pretrial orders, decided countless motions, and retains a working knowledge of where the suit has been and where it is headed. Such knowledge is crucial to competent case management. To transfer five and one-half years of work and paper to a new judge seems unfair, not only to the parties, but to the unlucky transferee and will in all likelihood be the occasion for delay. Decisions which might routinely be disposed of by me may well take a new judge longer until he has the opportunity to become acquainted with the case.
>
> 515 F. Supp., at 1081 (footnote omitted).

substantial ground for difference of opinion and [that] an immediate appeal ... may materially advance the ultimate determination of the litigation," and certified his decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Appendix C to the August 16 Petition.

Petitioners sought review in the Ninth Circuit on three separate jurisdictional grounds: (1) writ of mandamus pursuant to 28 U.S.C. § 1651 (Ninth Circuit Docket No. 81-7465); (2) interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (Ninth Circuit Docket No. 81-5481); and (3) appeal of a collateral order pursuant to 28 U.S.C. § 1291 and *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (Ninth Circuit Docket No. 81-8079). The petition for a writ of mandamus was set for argument and the alternative jurisdictional grounds rejected. 673 F.2d, at 1022.

On January 4, 1982, argument was heard on petitioners' application for a writ of mandamus, but no decision has yet been rendered. The Judicial Panel on Multidistrict Litigation has refused to appoint a new district judge to replace Chief Judge Muecke until after the Ninth Circuit ruling (Appendix H to the Petition in No. 82-287) and, if it follows the reasoning of Chief Judge Muecke, it may be incapable of assigning a new judge.[6] Thus, some 15 months have now passed since Judge Muecke recused himself; no new judge has been appointed to replace him; there are no immediate prospects for the appointment of a new judge; and serious questions exist over whether the Panel can act to appoint a new judge.

On August 16, 1982, following an extension granted by Justice Rehnquist, petitioners filed a timely Petition for Writ of Certiorari with regard to the dismissal of the 28 U.S.C. § 1291 appeal and denial of permission to appeal pursuant to 28 U.S.C. § 1292(b). That petition has been docketed as No. 82-287 before this Court.

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[6] Under 28 U.S.C. § 1407(d), the concurrence of four Panel members is necessary "to any action by the Panel." The 1982 financial disclosure statements of Judges Pointer, Caffrey, Harper and Daugherty show stock holdings in entities on the Master Class List. Thus, there are only three Panel members who would not own stock "in a party to the proceeding" under Chief Judge Muecke's ruling.

## REASONS WHY THE PREJUDGMENT WRIT SHOULD BE GRANTED

### I.

### THE RECUSAL ISSUE IS OF SUCH IMMEDIATE IMPORTANCE AS TO JUSTIFY A DEVIATION FROM NORMAL APPELLATE PRACTICE

The issue presented by this petition is one of those issues for which Supreme Court Rule 18 was promulgated as it is "of such imperative public importance as to justify the deviation from normal appellate practice and require immediate settlement in this Court." The district court's May 26, 1981 Opinion was a final order properly in the United States Court of Appeals for the Ninth Circuit pursuant to its October 31, 1981 Order accepting jurisdiction under a Petition for Writ of Mandamus. The decision by Chief Judge Muecke (*i.e.*, that an absent member of a class certified under Rule 23, Federal Rules of Civil Procedure, is a "party" within the meaning of 28 U.S.C. § 455(b)(4) such that judges must recuse themselves if they or their spouses own stock of any absent class members) is an unprecedented decision which touches the entire federal judicial system.

If Chief Judge Muecke's decision is the law, the effect on the *Cement and Concrete Antitrust Litigation* is (1) to deprive all parties of a judge who has presided over the proceedings for over five years and issued 75 pretrial orders, the unfairness of which was noted by the judge;[7] (2) to eliminate the ability of the Judicial Panel on Multidistrict Litigation to appoint a new judge (which the parties have lacked for almost 16 months);

[7] *See* footnote 5, *supra*.

and (3) to preclude the Supreme Court from reviewing any decision made in this litigation.[8]

The effect of Chief Judge Muecke's Opinion, if correct, extends far beyond the present litigation. Entirely new procedures will have to be developed to accomodate the idea that class members are parties for recusal purposes. Members of this Court would have to obtain lists of putative class members and refrain from considering decisions in any class action which has not been checked for a conflict or in which it is determined that a Justice or the Justice's spouse owns stock in a putative class member. This is not the present procedure,[9] and it would impose an additional burden on Court staff. For example, Justice Rehnquist previously ruled on motions for extensions of time in this litigation apparently without considering whether his stock ownership in absent class members requires recusal

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[8] If Chief Judge Muecke's decision is correct and a single share of stock in an absent class member is a disqualifying interest, this Court would not be able to grant or deny this petition or even decide the preliminary procedural motion for relief from the Rules being filed concurrently herewith. Under 28 U.S.C. § 1, this Court must have a quorum of six Justices, and lower court judgments must be affirmed pursuant to 28 U.S.C. § 2109 when a quorum cannot be convened.

Applying Chief Judge Muecke's ruling would result in recusal of five justices, thereby defeating the quorum and preventing consideration of this petition. The 1982 financial disclosure statements of Chief Justice Burger, and Justices Blackmun, Powell, Rehnquist and O'Connor include stock holdings in corporations which appear on the Master Class List. Justice O'Connor also appears to be disqualified under 28 U.S.C. § 455(b)(5)(ii) because of her spouse's former membership in a law firm representing a number of respondents and defendants in the district court.

As was true with the Petition in No. 82-287, the underlying issue of this petition—was Judge Muecke's recusal correct—must be decided as a prerequisite to even the fundamental decision of whether to accept or decline jurisdiction.

[9] The normal practice in class actions under Supreme Court Rules 21, 28.1 and 28.3 is simply to list the representative parties. *Mead Corp.* v. *Adams Extract Co.*, ____ U.S. ____, 102 S.Ct. 1994 (1982), *denying cert. sub. nom. In re Corrugated Container Grand Jury*, 659 F.2d 1330 (5th Cir. 1981), and *Weyerhaeuser Co.* v. *Lyman Lamb Co.*, No. 81-1618, and *Georgia-Pacific Corp.* v. *Lyman Lamb Co.*, No. 81-1619, ____ U.S. ____, 102 S.Ct. 2232 (1982), *granting cert. sub. nom. In Re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981), were all cases like the present one involving nationwide classes; yet in none of those cases did this Court have before it a list of all class members.

pursuant to section 455(b)(4). No review for possible disqualification as a result of ownership of stock in absent class members was done before certiorari was granted in *Weyerhaeuser Company* v. *Lyman Lamb Company*, No. 81-1618 and *Georgia-Pacific Corp.* v. *Lyman Lamb Company*, No. 81-1619 this year.[10]

Moreover, if Chief Judge Muecke is correct, the administrative burden of litigating a class action is staggering. For instance, if all putative class members are "parties", then under current Supreme Court practice each of those "parties" must be sent a copy of this petition and all other pleadings in the action below.[11] Such a result would make the use of Rule 23 prohibitively expensive and contravene its policy foundation.

This issue requires deviation from normal appellate procedure in order to settle the question for all class actions and establish a uniform procedure for evaluating recusal in those cases.[12] This case is one of those comtemplated by Chief

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[10] *See e.g., Weyerhaeuser Company* v. *Lyman Lamb Company*, No. 81-1618 and *Georgia-Pacific Corp.* v. *Lyman Lamb Company*, No. 81-1619, ____ U.S. ____ 102 S.Ct. 2232 (1982), *granting cert. sub. nom In Re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981). In Nos. 81-1618 and 81-1619, no list of "parties" or absent class members as defined by Chief Judge Muecke was filed with this Court under Supreme Court Rules 21 and 28.1 or is yet a matter of public record. However, based on the 1982 financial statements of members of this Court, it is apparent that at least Chief Justice Burger is a stockholder in a lumber company which may be a class member. Justices White and O'Connor have already recused themselves on other grounds and further evaluations based on an examination of the class list may reveal that there is no quorum to review Nos. 81-1618 and 81-1619 unless Judge Muecke's interpretation of recusal law is rejected.

[11] As discussed in Petitioners' Reply Memorandum in Support of "Motion For Relief From Compliance With Certain Provisions of Supreme Court Rules 19.3, 21.1(b), 28.1 and 28.3," in No. 82-287 costs alone for copying and service of the list of "parties" would exceed $15,289,000.00.

[12] A "Petition for Certification to the United States Supreme Court" is being filed in the Ninth Circuit.

Justice Burger when he said: "[A]ny case decided in any district court with a genuine need for swift review by the Supreme Court can be the subject of a petition for certiorari before judgment.[13]

In *U.S.* v. *Nixon*, 418 U.S. 683 (1974) this Court identified the criteria for granting certiorari prior to the issuance of an appellate order as "public importance of the issues presented and the need for their prompt resolution." 418 U.S. at 687. *See also Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *United States* v. *United Mine Workers*, 330 U.S. 258 (1947); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); *Richert Rice Mills* v. *Fontenot*, 297 U.S. 110 (1936); *Railroad Retirement Board* v. *Alton R. Company*, 295 U.S. 330 (1935); *Norman* v. *Baltimore & Ohio R. Company*, 294 U.S. 240 (1935). The *final* resolution of this issue must come from this Court, and, in fact, the issue is now before this Court in the Petition in No. 82-287 and as a threshold to consideration of *all* petitions arising from class actions.

## II.

## THE ISSUE PRESENTED BY THIS PETITION IS ALREADY BEFORE THE UNITED STATES SUPREME COURT

The issue of whether an absent class member is a "party" within the meaning of 28 U.S.C. § 455(b)(4) so that federal judges and Justices of the Supreme Court must recuse themselves if they or their spouses own stock of any absent class member is currently before this Court as a threshold question of the Petition in No. 82-287. Moreover, even if not raised by the parties, recusal issues must be addressed by this Court in performing its duty to generally evaluate potential conflicts in each and every class action before it. Although the Petition in No. 82-287 concerns jurisdictional rulings by the Ninth Circuit, the threshold determination that a quorum of this Court is present must be settled before that petition for certiorari (or

[13] Burger, *Annual Report on the State of the Judiciary*, 62 A.B.A.J. 443, 444 (1976).

this one) can be denied or granted. In addition, the issue is pending, albeit "behind the scenes", in Nos. 81-1618 and 81-1619, and other class actions which may be on this Court's docket.

The grant of a prejudgment writ of certiorari is appropriate where an identical important question is already before the Court. For example, in *Brown* v. *Board of Education*, 344 U.S. 1 (1952), this Court recognized that "it would be well to consider, simultaneously, the constitutional issues posed in the case of *Bolling* v. *Sharp*," which was then pending in the Court of Appeals for the District of Columbia. Following the Supreme Court's invitation in *Brown*, a petition for prejudgment writ of certiorari was filed and granted. *Bolling* v. *Sharpe*, 344 U.S. 873 (1952). In *Taylor* v. *McElroy*, 360 U.S. 709, 710 (1959), this Court "granted certiorari to the Court of Appeals before argument was had in that court because of the pendency here of *Greene* v. *McElroy*" which presented an identical issue. Likewise in *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946), this Court issued a writ of certiorari prior to a decision by the court of appeals "by reason of the close relationship of the important question raised to the question presented in *Porter* v. *Lee*," which was pending in the Supreme Court.

Because of the importance of the issue presented here to the federal judiciary and its pendency before the Court both in the Petition in No. 82-287, and as an issue in Nos. 81-1618 and 81-1619 and any other class actions which are now or in the future may be pending, the issue of recusal for stock ownership in an absent class member should be consolidated and decided once and for all.

## III.

## CONCLUSION

The petition for a prejudgment writ of certiorari should be granted.

DATED: September 17, 1982.

JOSEF D. COOPER
*Counsel of Record*
TRACY R. KIRKHAM
KIRK A. MCKINNEY
ELIZABETH A. SPURLOCK
COOPER, KIRKHAM, HAINLINE
& MCKINNEY, P.C.

KENNETH R. REED
MARK D. FREITAG
REED, GOLDSTEIN &
JENKINS-REED, P.C.
*Special Assistant Attorneys General for the State of Arizona*

By _____
Josef D. Cooper
*Counsel for Petitioners*

## ADDITIONAL COUNSEL FOR PETITIONERS


WILLIAM C. BARNARD
JAMES E. HUGHES
SOMMER & BARNARD
1100 Merchants Bank Building
Indianapolis, IN 46204

DONALD D. BARRY
BARRY & JARBOE
Post Office Box 4816
5020 West 28th
Topeka, KS 66604

DALE A. COMER
Assistant Attorney General
Antitrust Division
State of Nebraska
2115 State Capitol
Lincoln, NE 68501

JOHN C. BLAZIER
JOHN BLAZIER & ASSOCIATES
1600 American Bank Tower
Austin, TX 78701

JEROME I. BRAUN
JOHN L. COOPER
NEIL A. GOTEINER
FARELLA, BRAUN & MARTEL
235 Montgomery Street, Suite 3100
San Francisco, CA 94104

JAMES M. BROWN
Attorney General
RICHARD L. CASWELL
Chief Counsel
Antitrust Division
Department of Justice
235 Union Street, N.E.
Salem, OR 97310

BILL L. BRYANT, JR.
Chief, Antitrust Section
Department of Legal Affairs
The Capitol
Tallahassee, FL 32301

JEROME J. CATE
Chief, Antitrust Enforcement Bureau
CHARLES E. ERDMANN
Staff Attorney, Antitrust
Enforcement Bureau
State Capitol
Helena, MT 59601

JACK CHESTNUT
CHESTNUT & BROOKS, P.A.
900 Midland Bank Building
Minneapolis, MN 55401

JOHN A. COCHRANE
JAMES BRESNAHAN
COCHRANE & BRESNAHAN
360 Wabash Street, Suite 500
St. Paul, MN 55102

ROBERT S. ATKINS
ROBERT F. COLEMAN
FREEMAN, ATKINS & COLEMAN, LTD.
Three First National Plaza
Suite 2300
Chicago, IL 60602

ARTHUR J. DAVICH
DAVICH & POLLOCK
2214 North Central Ave., Suite 108
Phoenix, AZ 85004

JEFFREY ORITT
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

CARL W. DIVELBISS
1950 Arizona Bank Building
101 North First Avenue
Phoenix, AZ 85003

STEPHEN L. DUNNE
LAW OFFICES OF STEPHEN L. DUNNE
1139 Camino del Mar
Del Mar, CA 92014

SUSAN BETH FARMER
JAMES DRURY FLOWERS
Assistant Attorneys General
250 Administrative Building
64 North Union Street
Montgomery, AL 36130

JOHN R. FLOWERS, JR.
Assistant Attorney General
Chief, Antitrust Section
VIVIENNE MONACHINO
ROBERT J. CALUDA
Staff Attorneys
2-3-4 Loyola Building, Suite 717
New Orleans, LA 70112

HERBERT A. GARON
JACQUES F. BEZOU
GARON, BRENER & MCNEELY
829 Baronne Street
New Orleans, LA 70113-1183

KENTON C. GRANGER
THOMAS H. BRILL
ANDERSON, GRANGER, NAGELS AND LASTELIC, Chartered
306 Capitol Federal Building
95th and Nall Avenue
Overland Park, KS 66207

RICHARD H. GREENER
CLEMONS, COSHO, HUMPHREY & SAMUELSON
1110 Bank of Idaho Building
Boise, ID 83702

JERRY L. HARRIS
City Attorney
City of Austin
Municipal Building
P.O. Box 1088
Austin, TX 78767

ROBERT F. HILL
Special Assistant Attorney General for the State of Kansas
FRIEDMAN, HILL & ROBBINS
220 Equitable Building
730 Seventeenth Street
Denver, CO 80202

GERALD B. HIRSH
1005 Home Federal Savings Tower
Tucson, AZ 85701

WAYNE E. HUNDLEY
Deputy Attorney General
Chief, Antitrust Division
CARL M. ANDERSON
TERRI G. ZIMMERMAN
Assistant Attorneys General
2nd Floor, Kansas Judicial Center
Topeka, KS 66612

WILLIAM H. FERGUSON
THOMAS J. GREENAN
CHRISTOPHER KANE
FERGUSON & BURDELL
29th Floor, One Union Square
Seattle, WA 98101

KEVIN H. ROCHÉ
Special Assistant Attorney General
2nd Floor, Ford Building
117 University Avenue
St. Paul, MN 55155

MITCHELL A. KRAMER
HERBERT W. SALUS, JR.
STEVEN KAPUSTIN
KRAMER AND SALUS
1520 Locust Street, 7th Floor
Philadelphia, PA 19102

JOSEPH D. TYDINGS
MICHAEL E. KRIS
FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & CASEY
Suite 1010, Bender Building
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

JOHN S. LANCY
LANCY, SCULT & RYAN
2601 First Federal Savings Bldg.
3003 North Central Avenue
Phoenix, AZ 85012

GERALD MALTZ
JOHN A. BAADE
MILLER, PITT & FELDMAN
111 South Church Avenue
Tucson, AZ 85701

T. J. PANTALEO
PANTALEO AND KUDON, Chartered
Ahmanson Center East
3701 Wilshire Boulevard, 7th Floor
Los Angeles, CA 90010

ALISON B. SWAN
Chief Counsel
Antitrust Division
CHARLES EGER
Assistant Attorney General
Department of Law Building
1275 West Washington, Room 120
Phoenix, AZ 85007

JAMES V. SYLVESTER
Assistant Attorney General
Consumer Protection and
Antitrust Division
Office of Attorney General of Texas
P.O. Box 12548
Capitol Station
Austin, TX 78711

SAMUEL H. SEYMOUR
SEYMOUR SEEFRIED & HOFFMAN
1010 Wisconsin Avenue, Northwest
Suite 810
Washington, D.C. 20007

PETER K. SHACK
MICHAEL R. GRANEN
Attorney General's Office
580 Wilshire Boulevard, Suite 500
Los Angeles, CA 90010

N. ROBERT STOLL
JUSTINE FISCHER
STOLL & STOLL, P.C.
735 S.W. First Avenue
Portland, OR 97204

STEVEN D. STEINHILBER
Assistant Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102

JAMES WECHSLER
DONALD B. MONNHEIMER
Assistant Attorneys General
Department of Justice
State of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87503

PHILIP WEEKS
WILLIAM L. NOVOTNEY
MARISCAL, WEEKS, MCINTYRE
& FRIEDLANDER
830 North First Avenue
Phoenix, AZ 85003

THOMAS P. MCMAHON
Chief Counsel
JILL A. GROSS
Assistant Attorney General
Antitrust Unit, Enforcement Section
1525 Sherman Street
Denver, CO 80202